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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1836

GREGORY K. LEWIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
STATUTES INVOLVED	2
COUNTER-STATEMENT OF QUESTIONS PRESENTED	4
COUNTER-STATEMENT OF THE CASE	4
REASONS FOR DENYING CERTIORARI:	
Point I—Certiorari should be denied because of Petitioner's failure to fully raise his constitutional issues in the state courts	7
Point II—The issue presented by Petitioner does not implicate a case or controversy within Article III, Section 2	8
Point III—The requirements of the Miranda decision should not be applied to interrogations for motor vehicle offenses	11
CONCLUSION	14

Cases Cited

Arkansas v. Sanders, —— U.S. ——, 61 L.Ed.2d 235, 47 U.S.L.W. 4783 (1979)	13
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	10
Brown v. United States, 411 U.S. 223 (1973)	8
Dorszynski v. United States, 418 U.S. 424 (1974)	8
Henry v. Mississippi, 379 U.S. 443 (1965)	8

PAGE

Lowe v. United States, 407 F.2d 1391 (9 Cir. 1969) 12

Michigan v. Tyler, —— U.S. ——, 98 S.Ct. 1942 (1978) 8

Miranda v. Arizona, 384 U.S. 436 (1966) 4, 6-14

Moore v. Illinois, 408 U.S. 786 (1972) 8

State v. Angelo, 251 La. 250, 203 So.2d 710 (1967) 12

State v. Donley, 85 N.J. Super. 127, 204 A.2d 149 (App. Div. 1964) 9

State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970) 6, 11, 12

State v. Neal, 476 S.W. 2d 547 (Mo. 1972) 11

State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), cert. den. 396 U.S. 1007 (1970) 11

State v. Souss, 65 N.J. 453, 323 A.2d 484 (1974) 8

Tanner v. Vincent, 541 F.2d 932 (2 Cir. 1976) 10

United States Constitution Cited

Article III, Section 2 8

Statutes Cited

N.J.S.A. 2A:113-9 ..... 4, 9

N.J.S.A. 39:3-12 ..... 2, 12

N.J.S.A. 39:4-96 ..... 2, 12

N.J.S.A. 39:4-104 ..... 3, 12

N.J.S.A. 39:4-129 3

N.J.S.A. 39:4-129(b) 12

PAGE

Rule Cited

United States Supreme Court Rule, 28 U.S.C.A. 40-3 4

Other Authority Cited

Annual Report of the Administrative Director of the Courts (1976-1977) 12

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Respondent, the State of New Jersey, respectfully prays that the Writ of Certiorari sought by Petitioner to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on November 15, 1978, be denied.

Opinions Below

The following proceedings of the state courts are reproduced in the Petitioner's appendix: the order of the Supreme Court of New Jersey denying certification, not yet reported; and the opinion of the Superior Court of New Jersey, Appellate Division, reported at 163 N.J.Super. 439, 395 A.2d 211 (App. Div. 1978).

Statutes Involved

In addition to the statutes cited in the Petition for Certiorari, Respondent wishes to incorporate the following:

N.J.S.A. 39:3-12. Illegal securing of driver's license; punishment

No applicant for a driver's license shall employ or procure the employment of another person to take the license examination for him, and no person shall take a driver's license examination in the name of or in the place of the applicant. No person shall procure or attempt to procure a driver's license without taking the examination therefor as herein provided, nor shall a person procure or attempt to procure a driver's license for another who has not taken an examination therefor.

A person who violates any provision of this section shall be subject to a fine of not less than two hundred dollars nor more than five hundred dollars, or imprisonment for not less than thirty days nor more than ninety days, or both, at the discretion of the court.

N.J.S.A. 39:4-96. Reckless driving; punishment

A person who drives a vehicle on a highway heedlessly, in willful or wanton disregard of the rights

or safety of others, in a manner so as to endanger, or be likely to endanger, a person or property, shall be guilty of reckless driving and be punished by imprisonment in the county or municipal jail for a period of not more than 60 days, or by a fine of not more than $200.00, or both. On a second or subsequent conviction he shall be punished by imprisonment for not more than 3 months, or by a fine of not more than $500.00, or both.

N.J.S.A. 39:4-104. Violations of article; penalty

A person violating a section of this article [Article 12-Speed] shall, for each violation, be subject to a fine of not more than $200.00, or imprisonment for a period not exceeding 10 days, or both, except as herein otherwise provided.

N.J.S.A. 39:4-129. Action in case of accident.

(b) The driver of any vehicle knowingly involved in an accident resulting only in damage to a vehicle, including his own vehicle, or other property which is attended by any person shall immediately stop his vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of subsection (c) of this section. Every such stop shall be made without obstructing traffic more than is necessary. Any person who shall violate this subsection shall be fined not less than $25.00 nor more than $100.00, or be imprisoned for a period of not more than 30 days, or both, for the first offense, and for a subsequent offense, shall be fined not less than $100.00 nor more than $200.00, or be imprisoned for a period of not less than 30 days nor more than 90 days, or both.

Counter-Statement of Questions Presented

1. Whether the failure of Petitioner to fully raise his constitutional issues in state court mandates denial of the petition for writ of certiorari.

2. Whether the lack of a sufficient case or controversy mandates dismissal of the petition for writ of certiorari when even a favorable decision on the merits of his argument would not change the outcome of Petitioner's case.

3. Whether the requirements of *Miranda* v. *Arizona* should be extended to routine interrogation for motor vehicle violations which expose offenders to potential incarceration.

Counter-Statement of the Case

Pursuant to U.S. Sup. Ct. Rule 40-3, 28 U.S.C.A., Respondent respectfully submits the following additions and corrections to Petitioner's Statement of the Case.

Petitioner Gregory K. Lewin was convicted of causing the death of Thomas Brady, a pedestrian, by careless and heedless operation of his automobile, contrary to N.J.S.A. 2A:113-9. Petitioner had been driving his automobile in an intoxicated condition when he struck Thomas Brady and Deborah Majoros, a young couple who were crossing the street after leaving a roadhouse in the Borough of Point Pleasant, New Jersey.

Officer Thomas M. Santoro of the Borough of Point Pleasant Police was patrolling in his police vehicle near the roadhouse when he saw several people running across the street and noticed Deborah lying on the sidewalk about one foot from the curb. The officer immediately summoned an ambulance. He noted that Deborah was bleeding from the head and had arm and leg injuries. She was extremely

upset and could only say that she had been struck by a car. The officer next went to Thomas Brady, whom he found over fifty feet from the intersection, lying in some small bushes. Brady's breathing was very deep, and sounded like moaning. He was bleeding from the mouth and ears and both of his legs appeared broken. Officer Santoro rendered first aid and tried to make both victims comfortable until the ambulance arrived.

As Officer Santoro was helping Brady, he inquired of the crowd gathering around if there were any witnesses to what had occurred. Petitioner Gregory Lewin responded, "I hit them." The officer continued rendering first aid to Brady, but he told Lewin to stand by until the ambulance arrived. Petitioner obeyed.

After the victims were taken to the hospital, Officer Santoro turned his attention to the Petitioner. When he spoke to him, the officer observed that his eyes were bloodshot and watery, his speech was low and slightly slurred, and he wavered and swayed on his feet, continually leaning for balance. There was a strong smell of alcohol on his breath. In the officer's expert opinion, Petitioner was intoxicated. After making these observations and reaching this conclusion, Officer Santoro arrested Petitioner for driving while intoxicated, and placed him in a police vehicle to take him to headquarters.

The officer spoke to Petitioner at headquarters and ascertained that Lewin had been drinking beer and whiskey at the roadhouse. In response to Officer Santoro's inquiry concerning how the accident had happened, Lewin stated that he left the roadhouse, drove a short distance, realized he had hit something, drove two more blocks, and then turned around and returned to the place of impact.

After the Petitioner's brief interview with Officer Santoro, the police administered a breathalyzer test to him.

Following this test, Detective Joseph Lynch took a statement from Petitioner which was taped and then transcribed. Before asking any questions, the detective read Petitioner his *Miranda* warnings and ascertained that he would waive his rights. As Petitioner was describing the amount of alcohol he had consumed, his statement was interrupted to inform Petitioner that the police had just learned that Brady had died. The statements then resumed, with Petitioner admitting that he had struck the pedestrians, but claiming that they had walked in front of his car.

At the scene, Officer Santoro found three empty beer containers in the Petitioner's car. The automobile had sustained damage to the right headlight and fender. Two handprints were found on the center of the hood of the vehicle.

Petitioner was charged with the indictable offense of causing death by careless operation of his automobile. At trial defense counsel moved to suppress the statements given to Officer Santoro at headquarters. Particular emphasis was placed by counsel on a statement given by Petitioner concerning the exact driveway from which he had exited the roadhouse. No motion was made to exclude either the oral statements given by Petitioner to the patrolman at the scene of the accident or the recorded statement given to the detective at headquarters.

On appeal, Petitioner argued that the statements to the patrolman were beyond the scope of *State* v. *Macuk,* 57 N.J. 1, 268 A.2d 1 (1970), a decision of the New Jersey Supreme Court which held that the rules of *Miranda* were inapplicable to motor vehicle offenses. The Appellate Division rejected this contention, noting that "[i]f, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible,

without *Miranda* warnings, in a prosecution of the charges as to which they were taken, they retain their valid character and are equally admissible in a subsequent prosecution of a criminal offense." 395 A.2d at 212. Thereafter, the New Jersey Supreme Court denied certification.

The present Petition for Writ of Certiorari was docketed with this Court on June 8, 1979.

REASONS FOR DENYING CERTIORARI

POINT I

Certiorari should be denied because of petitioner's failure to fully raise his constitutional issues in the state courts.

The State contends that Petitioner failed to fully preserve his constitutional contentions in the state courts of New Jersey. Although he now seeks a writ of certiorari to challenge the New Jersey rule which permits interrogation of motor vehicle offenders without *Miranda* warnings, nowhere was this issue raised at trial or in his brief in the Appellate Division of Superior Court.* Similarly, in his petition for certification to the New Jersey Supreme Court, Petitioner failed to cast his issues in the Sixth Amendment form in which he now seeks review. For

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* In his Appellate Division brief Petitioner argued that the police questioning of him went beyond the limit authorized by the New Jersey Supreme Court in *State* v. *Macuk,* 57 N. J. 1, 268 A.2d 1 (1970), which held *Miranda* v. *Arizona,* 384 U.S. 436 (1966) inapplicable to motor vehicle offenses. He did not argue, as he now does in the petition for certiorari, that *State* v. *Macuk* sets forth an unconstitutional standard.

these reasons, Respondent asserts that certiorari must be denied.

New Jersey has a clear rule that issues "in no wise alluded to, much less squarely presented, in the courts below . . . need be given no consideration" in our higher appellate tribunals. *State* v. *Souss,* 65 N.J. 453, 460, 323 A.2d 484, 488 (1974). In light of the failure of Petitioner to fully and fairly raise his claims in state court and in light of the denial of his petition for certification, the State submits that there is an adequate state law procedural ground presently barring direct review of Petitioner's federal contentions. *Michigan* v. *Tyler,* —— U.S. ——, 98 S.Ct. 1942, 1951 n.7 (1978); *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965). When a contention has not been raised in state courts, "the issue is not one properly presented for review" before the United States Supreme Court. *Moore* v. *Illinois,* 408 U.S. 786, 799 (1972). Accord, *Dorszynski* v. *United States,* 418 U.S. 424, 431 n.7 (1974); *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973).

Accordingly, the State submits that the writ of certiorari should be denied.

POINT II

The issue presented by petitioner does not implicate a case or controversy within Article III, Section 2.

Throughout his petition for certiorari Petitioner emphasizes the lack of *Miranda* warnings preceding his statements to the police. In truth, Petitioner gave two statements, the first consisting of brief responses to routine questions posed by the investigating officer, and the second consisting of a lengthy confession to a detective who preceded his interrogation with *Miranda* warnings. Never has Petitioner claimed that his initial statements to the investigating officer induced him to confess to the detective. At trial and on appeal Petitioner has not disputed the admissibility of the confession, which embraced each and every topic previously covered by the patrolman. Accordingly, even assuming for the sake of argument that *Miranda* warnings are constitutionally required following arrests for motor vehicle offenses, such a requirement would have had no effect on the outcome of the present case.

At the heart of Petitioner's state court objections to the admissibility of his *Miranda*-less statements was his fear that his credibility would be damaged by one inconsistent statement which he gave to the patrolman. This discrepancy concerned the location of the exit through which Petitioner left the roadhouse parking lot prior to driving down the street on which he struck the pedestrians. It was the existence of this discrepancy which prompted defense counsel to move to exclude the statements given to the patrolman.

The record of the trial reveals, however, that the location of the parking lot exit had utterly no bearing on the issues before the jury. The jury in the present matter had to determine whether Petitioner's operation of his automobile had been careless and heedless, in willful or wanton disregard for the rights or safety of others. N.J.S.A. 2A:113-9; *State* v. *Donley,* 85 N. J. Super. 127, 204 A.2d 149 (App. Div. 1964). The focus of the trial was on the degree of Petitioner's intoxication as it affected his ability to drive in a safe manner, *i.e.,* to see the pedestrians, to gauge his location in the lane, to bring the car to a halt and to swerve to avoid the accident. The path by which the automobile left the parking lot was not in serious dispute. This is particularly true

since Petitioner was able to convincingly explain the parking lot discrepancy as a good faith mistake by a person shaken by the accident and unfamiliar with the street names in the area.

As can be seen, the *Miranda* issue had scant substantive bearing on the present trial. Even if this Court were to rule that it was error for the patrolman to fail to administer warnings to the Petitioner, the confession to the detective would still remain to support the conviction.* The Court's opinion would thus be purely advisory.

It is well settled tht "[t]he judicial power does not extend to the determination of abstract questions." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324 (1936). A justiciable controversy must be founded in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining. *Id.* In light of the fundamental lack of controversy evinced by the present appeal, the State submits that a grant of certiorari would be a futile exercise. This is true even if, as Petitioner alleges, there is a split of authority across the country on the applicability of *Miranda* to motor vehicle offenses. The present case is an inappropriate one in which to resolve this conflict, involving as it does two cumulative statements and no issue of taint.

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* This result might be different had Petitioner argued that his initial admissions provided inducement for the confession—the so called "cat out of the bag" theory. See, *e.g., Tanner* v. *Vincent,* 541 F.2d 932, 934-937 (2 Cir. 1976). The failure of Petitioner to raise this contention at any level, however, precludes this Court from taking cognizance of it. See Point I, *supra.*

POINT III

The requirements of the *Miranda* decision should not be applied to interrogations for motor vehicle offenses.

Petitioner contends that the rules of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), should be applied to custodial interrogation for motor vehicle offenses in which the motorist faces the possibility of incarceration. Respondent strongly disagrees, contending that such a requirement is both unnecessary and highly burdensome on law enforcement.

First, the type of questioning and investigative procedures utilized for petty offenses differs markedly from that employed for serious crimes. In minor cases there is usually no necessity for concentrated investigation, and the interrogation generally occurs at or near the scene of the infraction. *State* v. *Pyle,* 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert.* den. 396 U.S. 1007 (1970). The questioning itself generally "encompasses only simple standard inquiries for the purpose of a necessary accident or violation police report . . ." *State* v. *Macuk,* 57 N.J. 1, 268 A.2d 1, 9 (1970). As a result, the fundamental reason for the *Miranda* rules—the need to overcome the inherent pressures of the interrogation atmosphere—are not present in the investigation of motor vehicle offenses. *State* v. *Neal,* 476 S.W. 2d 547 (Mo. 1972) (en banc).

Second, the requirement of *Miranda* warnings for minor offenses would severely burden law enforcement and the expeditious administration of justice without realizing the benefits to the individual which accrue when warnings are administered to a suspect undergoing interrogation for a serous crime. *State* v. *Macuk, supra,* 268 A.2d at 9. The *Miranda* decision was never meant to hamper the traditional investigatory functions of law enforcement. 384 U.S.

at 481; *Lowe* v. *United States,* 407 F.2d 1391 (9 Cir. 1969). A further extension of *Miranda* would place an undue burden on both the police and the municipal courts, which would be compelled to schedule additional hearings in otherwise routine traffic cases. "The great number of these lesser offenses, and the limited number of law enforcement officers, militate of necessity against surrounding the officers' routine investigation of these lesser offenses with elaborate, strict, highly formalized procedural safeguards." *State* v. *Angelo,* 251 La. 250, 203 So.2d 710, 711 (1967).

Third, and closely related to the previous argument, "it would be utterly impossible to provide sufficient lawyers to consult with the number of motor vehicle violators who would be likely to request legal advice." *State* v. *Macuk, supra,* 268 A.2d at 9. Although Petitioner seeks to extend *Miranda* to all offenses having a potential of incarceration, he fails to note the sheer volume of violators which this rule would encompass. For example, leaving the scene of an accident in which property damage (but no bodily injury) was caused can result in a 30-day term for a first offender and a 90-day term for a subsequent offender. N.J.S.A. 39:4-129(b). The potential punishment for reckless driving is 60 days in jail for a first offender and three months for a subsequent offender. N.J.S.A. 39:4-96. Speeding is punishable by imprisonment for a period not exceeding 10 days. N.J.S.A. 39:4-104. Illegal securing of a driver's license is punishable by incarceration for not less than 30 days nor more than 90 days. N.J.S.A. 39:3-12. Although these are but a few examples, the number of motor vehicle offenses carrying a potential of imprisonment are voluminous.

According to the *Annual Report of the Administrative Director of the Courts* (1976-1977), 1,013,386 non-parking traffic complaints and 2,483,353 parking complaints were

filed in the New Jersey municipal courts between September 1, 1976 and August 31, 1977. In that same year, 2212 persons received jail terms for the non-parking offenses and 168 served time for parking violations. From these figures, it is seen that the probability of receiving a custodial term for a motor vehicle offense is extremely low. On the other hand, the mere possibility of receiving such a sentence, based on statutory authority, is rather high. Thus, to impose the requirements of *Miranda* on all offenses which harbor a potential for incarceration would stagger law enforcement without securing substantial benefits to a significant percentage of violators.

Respondent urges this Court to consider the practical effects of the wholesale extension of *Miranda* urged by Petitioner. Motorists who request lawyers prior to routine interrogation will have to be transported to police stations to await counsel. Their vehicles will have to be secured in reasonable locations with an eye toward the safety of the automobile and its contents. Such measures would strain the resources of virtually all police departments. In addition, in many cases counsel will have to be provided by the State, which will have to absorb the cost. As this Court has observed in an analogous situation involving warrantless searches of automobiles stopped on the highways, "if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. * * * Such a constitutional requirement therefore would have imposed severe, even impossible burdens on many police departments." *Arkansas* v. *Sanders,* —— U.S. ——, 61 L.Ed.2d 235, 47 U.S.L.W. 4783, 4787 n.14 (1979). The result of extending *Miranda* will be even more drastic.

Based on all of these policy considerations, Respondent submits that the *Miranda* requirements should not be extended to interrogation of motor vehicle offenders.

CONCLUSION

For the reasons which are set forth herein, it is respectfully urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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